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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-690

KATHLEEN R. REITER,

Petitioner,

vs.

SONOTONE CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statute Involved 2

Statement of the Case 2

Reasons for Denying the Writ:

I. The Federal Appellate Courts, Like the Court Below, Repeatedly Have Interpreted the Phrase "Business or Property" in Section 4 of the Clayton Act to Require Injury to a Commercial Interest or Enterprise. 4

II. The Legislative History of Section 4 of the Clayton Act Plainly Confirms that Only a Person Injured in a Commercial Interest or Enterprise Has Standing to Sue. 8

Conclusion 10

Appendix A-1

TABLE OF AUTHORITIES

Cases:

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1939) 6

Beckers v. Int'l Snowmobile Industry Ass'n, 581 F. 2d 1308 (8th Cir. 1978) 6

Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906) 5

Cleary v. Chalk, 499 F.2d 1315 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974) 5

GAF Corp. v. Circle Floor Co., 463 F. 2d 752 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973) 7

Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) 4, 5, 8

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) ... 4
In re Beltone Electronics Corp., *et al.*, FTC Docket No. 8928, Initial Decision, Sept. 2, 1976 3
In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F. 2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973) 7, 8
Perkins v. Standard Oil Co., 395 U.S. 642 (1969) .. 6
Ragar v. J. T. Raney & Sons, 521 F. 2d 795 (8th Cir. 1975), *aff'g* 388 F. Supp. 1184 (E. D. Ark) 6
Reibert v. Atlantic Richfield Co., 471 F. 2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973) 7
Tugboat Inc. v. Mobile Towing Co., 534 F. 2d 1172 (5th Cir. 1976) 7
Wallace v. Kern, 520 F. 2d 400 (2d Cir. 1975), *cert. denied* 424 U.S. 912 (1976) 5

Statutes:

15 U.S.C. §§ 1, 2 & 14 (1970) 3
15 U.S.C. § 15 (1970) 2
15 U.S.C. § 20 (1970) 5
15 U.S.C. § 26 (1970) 9
28 U.S.C. § 1254 (1) (1970) 2
28 U.S.C. § 1292 (b) (1970) 3

Miscellaneous:

S.1, 51st Cong. 1st Sess. § 2 (1889) 9
21 Cong. Rec. 2901 (1890) 9

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Beltone Electronics Corporation, Dahlberg Electronics, Inc., Textron Inc., and Radioear Corporation respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit entered in this case on June 19, 1978.

Opinions Below

The opinion of the United States District Court for the District of Minnesota (App. A-2 of Petition) is reported at 435 F. Supp. 933. The opinion of the United States Court of Appeals for the Eighth Circuit (App. A-12 of Petition) is reported at 579 F.2d 1077.

Jurisdiction

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 19, 1978. A timely petition for rehearing *en banc* was denied on August 11, 1978. On August 28, 1978, the Eighth Circuit entered an order staying issuance of its mandate for 60 days, and the petition for certiorari was filed within that time. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1) (1970).

Question Presented

Whether an antitrust plaintiff, asserting no injury to a commercial interest or enterprise, satisfies the threshold standing test of Section 4 of the Clayton Act, 15 U.S.C. §15 (1970), which requires injury to "business or property."

Statute Involved

Section 4 of the Clayton Act, 15 U.S.C. §15 (1970), provides in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained. . . ."

Statement of the Case

Petitioner Kathleen R. Reiter commenced this class action for treble damages on May 2, 1975 against respondents, certain hearing aid manufacturers, under Section 4 of the Clayton Act, 15 U.S.C. §15 (1970). Reiter would seek to represent a nationwide class of persons who, like herself, purchased hearing aids for personal use, not directly from the manufacturers, but from independent retail dealers.

In her complaint, Reiter alleges that the respondent manufacturers violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, 15 U.S.C. §§ 1, 2, & 14 (1970). Reiter claims that the manufacturers restricted the territories and customers of their retail dealers, required those dealers to deal exclusively in their respective hearing aids, used their dealer's customer lists for their own purposes, prohibited non-authorized dealers from dealing in or repairing their hearing aids, and fixed the retail prices of the dealers.[1] Subsequent to Reiter's filing of the complaint, all manufacturers answered and denied each of her material allegations.

The manufacturers moved for judgment on the pleadings or for summary judgment in the district court. Among other things, they urged that Reiter, as a retail purchaser of hearing aids for personal use, lacked standing to sue for damages under Section 4 of the Clayton Act because she was not injured in her "business or property" within the meaning of the Act. The district court denied the manufacturers' motions but certified the standing issue for interlocutory review under 28 U.S.C. §1292(b) (1970). The Eighth Circuit authorized the interlocutory appeal and reversed the district court, holding that retail purchasers like Reiter

[1] It is instructive to compare the complaint which contains a full panoply of vertical dealer claims, with the "Question Presented" in Reiter's petition, which suggests that this is a simple price-fixing case. (*See* Resp App. at A-8 to A-10) The allegations made by Reiter are similar to those made by the FTC in a proceeding filed some two years before this action. The Administrative Law Judge found, in the only matter adjudicated on the merits, that Beltone Electronics Corporation, a respondent herein, did not engage in price-fixing. (See In re Beltone Electronics Corp., *et al.*, FTC Docket No. 8928, Initial Decision, Sept. 2, 1976 at 88.)

are not injured in their "business or property" for purposes of Section 4.[2] From this decision, Reiter now petitions this Court.

Reasons for Denying the Writ

The basic issue presented in the petition—the meaning of the restrictive "business or property" language in Section 4 of the Clayton Act—is not novel. Indeed, the opinion below is simply the latest of many Federal appellate decisions which repeatedly have concluded that the phrase "business or property" is limited to commercial or competitive interests. The legislative history of Section 4 of the Clayton Act confirms this view. Accordingly, petitioner presents no compelling question of Federal law warranting review by this Court.

I.

The Federal Appellate Courts, Like the Court Below, Repeatedly Have Interpreted the Phrase "Business or Property" in Section 4 of the Clayton Act to Require Injury to a Commercial Interest or Enterprise

This Court already has construed the meaning of the phrase "business or property" in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). In denying the State of Hawaii a right to sue for injury to its general economy allegedly attributable to a violation of the antitrust laws, it declared:

[2] The Eighth Circuit did not reach the bar to petitioner's action raised below by respondents as a result of this Court's holding in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), that indirect purchasers are not permitted to attempt to establish injury within the meaning of Section 4 by demonstrating a "pass-on" of alleged price overcharges from purchasers who deal directly with the alleged violators of the antitrust laws. *Id.* at 728-29. For this additional reason, the petitioner lacks standing to sue under Section 4.

> "Like the lower courts that have considered the meaning of the words 'business or property,' we conclude that they refer to commercial interests or enterprises." *Id.* at 264.

Based upon this conclusion, the Court held that "[w]hen the State seeks damages for injuries to its *commercial interests*, it may sue under §4." *Id.* (Emphasis added.)[3]

The circuit courts of appeal which have considered the meaning of the phrase "business or property" have repeatedly determined that it refers only to commercial interests or enterprises. Reiter's focus on federal district court opinions, none of which has been rendered since the Eighth Circuit's opinion below, is misplaced since those cases do not create a conflict among the circuits. The language of this Court in *Hawaii* as well as that of the circuit courts, although arising in different factual contexts, clearly supports the holding of the Eighth Circuit.[4]

[3] *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906), is wholly consistent with this Court's view that Section 4 limits standing to persons who sustain injury to commercial interests or enterprises. *Chattanooga* involved a sale of iron pipe to a municipality for use in the city's waterworks system. To the limited extent that the case even addresses the meaning of the phrase "business or property," *Chattanooga* stands for the proposition that a municipal corporation acting in its proprietary capacity (which indeed is often the capacity of any governmental entity) is injured in its commercial property when victimized by price-fixing. 203 U.S. at 394. *Chattanooga* has no bearing on whether a retail purchaser like Reiter is entitled to bring an action under Section 4.

[4] The petition attempts to create the appearance of a conflict among the circuits by referring to the decision of the District of Columbia Circuit in *Cleary v. Chalk*, 488 F.2d 1315 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974). The "conflict" stems from dicta in a footnote to the *Cleary* opinion. 488 F.2d at 1319, n.17. All dicta—and particularly footnotes — "must be viewed in the light of the factual and legal setting encountered." *Wallace v. Kern*, 520 F.2d 400, 406 (2d Cir. 1975), *cert. denied*, 424 U.S. 912 (1976). In *Cleary*, the court upheld the dismissal of an antitrust damage action brought by bus riders on the ground that the bus company's sale of land to its wholly-owned subsidiaries in return for all their stock did not violate Section 10 of the Clayton Act, 15 U.S.C. § 20 (1970).

The opinion below, which the Eighth Circuit recently has reaffirmed in another case,[5] relies in part on a prior decision of that circuit confirming this Court's expressed view that a purported antitrust plaintiff must assert competitive injury. The prior controlling case in the Eighth Circuit was *Ragar v. J. T. Raney & Sons,* 521 F.2d 795 (8th Cir. 1975), *aff'g* 388 F. Supp. 1184 (E.D. Ark.). In that case, the Arkansas District Court denied standing to residential homeowners who sued investment banking firms for allegedly conspiring to fix a high rate of interest on municipal bonds in violation of the antitrust laws. In dismissing the complaint, the trial court reasoned that plaintiffs must show:

> ". . . that they have been injured in their business or property as that phrase is used in Section 4 of the Clayton Act. The Supreme Court of the United States has emphasized that in determining who may sue under the antitrust laws, the central inquiry is one of *competitive injury*. Perkins v. Standard Oil Co., 395 U.S. 642, 648-49, 89 S.Ct. 1871, 23 L.Ed. 2d 599 (1969). Since the purpose of the antitrust laws is the 'prevention of restraints to free competition in business and commercial transactions,' Apex Hosiery Co. v. Leader, 310 U.S. 469, 493, 60 S.Ct. 982, 992, 84 L.Ed. 1311 (1940), it follows that only those persons injured in their competitive positions in a business in which they are engaged should be permitted standing to sue under the Clayton Act." 388 F.Supp. at 1187. (Emphasis in original.)

The Eighth Circuit affirmed without reservation "on the basis of the district court's soundly reasoned opinion." 521 F.2d at 796.

[5] *Beckers v. Int'l Snowmobile Industry Ass'n,* 581 F.2d 1308 (8th Cir. 1978).

Similarly, the Second Circuit in *GAF Corp. v. Circle Floor Co.,* 463 F.2d 752 (2d Cir. 1972), *cert. dismissed,* 413 U.S. 901 (1973), declared that injury to competitive position in business is critical to suit under Section 4 of the Clayton Act:

> This court has emphasized that, to recover, the plaintiff must allege and prove that the illegal restraint of trade injured his *competitive position* in the business in which he or she was engaged . . . [citations omitted] . . . The general proposition underlying cases such as these is that only a person whose competitive business position was harmed by the *anticompetitive* effects of the alleged restraint of trade can maintain a treble damage action." 463 F.2d at 758, 759. (Emphasis in original.)

Likewise, the Fifth Circuit in *Tugboat Inc. v. Mobile Towing Co.,* 534 F.2d 1172, 1175 (5th Cir. 1976), recognized that "[c]learly, the injury must be to commercial interests or enterprises." In *Reibert v. Atlantic Richfield Co.,* 471 F.2d 727 (10th Cir.), *cert. denied,* 411 U.S. 938 (1973), the Tenth Circuit, in an action where plaintiff alleged that he had lost his job because of an anticompetitive merger, also concluded that plaintiff "to satisfy the business or property prerequisite. . . must demonstrate that his job is a commercial venture or enterprise." 471 F.2d at 730.

The Ninth Circuit also has declared that a private plaintiff must allege injury to a competitive enterprise in order to satisfy the "business or property" limitation of Section 4. *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31,* 481 F.2d 122 (9th Cir.), *cert denied,* 414 U.S. 1045 (1973). Referring to this Court's interpretation of the phrase "busi-

ness or property" in *Hawaii v. Standard Oil Co., supra*, the court stated:

> "First, a plaintiff must allege injury to his 'business or property', a term definitively limited to interests in commercial ventures or enterprises. . ." 481 F.2d at 126.

Further, the court observed:

> "To attain standing, a plaintiff must thus allege that the antitrust violation injured a *commercial enterprise* of the plaintiff in the area of the economy in which the elimination of competition occurred. *Id.* at 128. (Emphasis added.)

In light of the foregoing, the Eighth Circuit's conclusion that a retail purchaser like Reiter has sustained no injury to "business or property" within the meaning of Section 4 is scarcely surprising. Given the consistency of the Eighth Circuit's opinion with the conclusions of this Court and other Federal appellate courts, further review of the matter by this Court is unnecessary and inappropriate.

II.

The Legislative History of Section 4 of the Clayton Act Plainly Confirms that Only a Person Injured in a Commercial Interest or Enterprise Has Standing to Sue

The judicial view that "business or property" is synonomous with commercial interest or enterprise is fully supported in the legislative history of Section 4.[6] The Eighth

[6] Reiter's contention that the term "property" encompasses all pecuniary interests would render the statutory term "business" superfluous. By contrast, the "commercial interests" interpretation of this Court preserves the significance of both "business" and "property," since one may possess commercial property unconnected with his business or primary livelihood.

Circuit below carefully reviewed this history and correctly concluded that the purpose of Section 4 was to protect the small businessman, not the ordinary retail purchaser.

The predecessor to Section 4 of the Clayton Act was Section 2 of the Sherman Act. The bill initially introduced by Senator Sherman on December 4, 1889, S.1, 51st Cong. 1st Sess. §2 (1889), permitted damage actions by "any person or corporation injured or damnified by [an unlawful] arrangement, contract, agreement, trust, or combination." Congress did not adopt this broad language, however, and the bill was thoroughly revised in the Judiciary Committee. Thus, on April 2, 1890, when the Committee reported out the bill in substantially the form in which it was finally enacted, the Committee had limited recovery to "any person . . . injured in his business or property." This restrictive language was later incorporated into the private damage provision which became Section 7. *See* 21 Cong. Rec. 2901 (1890).

As the Eighth Circuit observed below, Congress' deliberate rejection of the broad language contained within Sherman's bill cannot be ignored. The bill which might have accorded retail purchasers like Reiter standing to sue for damages was rejected. This action evidenced a congressional recognition that the remedy of damage suits by individuals injured solely in their capacities as retail purchasers was both undesirable and unworkable.

When Congress enacted the Clayton Act in 1914, it incorporated Section 7 of the Sherman Act, with minor modifications, as Section 4 of the Clayton Act. Although the Clayton Act added a broad new private injunctive remedy for any person threatened with loss or damage from antitrust violations, 15 U.S.C. §26, Congress did not similarly

expand the category of person or kind of injury covered by the treble damage remedy.

In short, the legislative history emphatically supports the Eighth Circuit's opinion in this case. A retail purchaser who is not engaged in any commercial venture or enterprise is simply beyond the scope of the damage remedy in Section 4 of the Clayton Act. Petitioner cannot convincingly transform this obvious conclusion into a contested issue worthy of this Court's examination.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

KATHLEEN R. REITER, individually and as representatives of the Class of All Personal Users of Hearing Aids located in the United States,

Plaintiffs,

vs.

SONOTONE CORPORATION, a New York corporation; BELTONE ELECTRONICS CORPORATION, an Illinois corporation; DAHLBERG ELECTRONICS, INC., a Minnesota corporation; TEXTRON INCORPORATED, a Delaware corporation and RADIOEAR CORPORATION a Delaware corporation,

Defendants.

COMPLAINT—ANTITRUST CONSUMER CLASS ACTION.

Civil No. CIV. 4-75-206

The plaintiff, by her attorneys, for her complaint against defendants, demanding a trial by jury respectfully alleges:

DEFINITION

1. As used herein, "hearing aid" means all products ordinarily manufactured and/or sold by hearing aid manufacturers, including defendants herein, for personal use.

JURISDICTION AND VENUE

2. This Complaint is filed and jurisdiction of this Court is invoked pursuant to the provisions of Sections 4 and 12 of the Clayton Act (15 U.S.C. 15, 22) and Sections 1331 and 1336 of Title 28, United States Code (28 U.S.C. 1331, 1337) to recover treble damages sustained by plaintiff and other members of the class represented by her, and injunctive relief if appropriate by reason of the violations by defendants of Section 1 of the Sherman Act (15 U.S.C. 1).

3. Each of the defendants either transacts business or is found within the District of Minnesota, or the effects of the illegal activities alleged herein were felt in said district.

PLAINTIFF AND CLASS

4. Plaintiff is an individual residing in Richfield, Minnesota, who purchased two hearing aids during the year 1973.

5. Plaintiff brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, on her behalf and as representatives of a class. The class consists of all persons in the United States or any sub part thereof who directly or indirectly purchased, at prices affected by the activities complained of, hearing aids.

6. Said class members are in a similar position to that alleged herein by plaintiff, and are members of a class so numerous that joinder of all parties is impracticable.

7. The rights of said class members, including plaintiff, involve common questions of law and fact which pre-

dominate over any questions affecting only individual class members, and this class action is superior to other methods for the fair and efficient adjudication of the controversy herein described.

8. The claims of plaintiff are typical of those to be asserted for the class, and plaintiff will fairly and adequately protect the interests of the class.

DEFENDANTS

9. BELTONE ELECTRONICS CORPORATION (hereinafter "Beltone") is named a defendant herein. Beltone is a corporation organized under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois. Beltone has manufactured hearing aids since 1941. In 1970, Beltone had sales of hearing aid products in excess of ten million ($10,000,000.00) dollars, more than any other seller of hearing aids in the United States, representing approximately twenty per cent (20%) of the hearing aid market.

10. DAHLBERG ELECTRONICS, INC. (hereinafter "Dahlberg") is named a defendant herein. Dahlberg is a corporation organized under the laws of the State of Minnesota, with its principal place of business in Minneapolis, Minnesota. Dahlberg and its corporate predecessors have manufactured hearing aids since 1949. In 1970, Dahlberg was the third largest hearing aid manufacturer with sales in excess of four million ($4,000,000.00) dollars, representing approximately eight per cent (8%) of the hearing aid market.

11. SONOTONE CORPORATION (hereinafter "Sonotone") is named a defendant herein. Sonotone is a corporation organized under the laws of the State of New York, with its principal place of business in Elmsford, New York, Sonotone has manufactured hearing aids since 1929. In 1970, Sonotone was the fifth largest hearing aid manufacturer in the United States, with sales in excess of three million ($3,000,000.00) dollars, representing approximately six per cent (6%) of the hearing aid market.

12. TEXTRON, INC. (hereinafter "Textron") is named a defendant herein. Textron is a corporation organized under the laws of the State of Delaware, with its principal place of business in Providence, Rhode Island. Maico Hearing Instruments (hereinafter "Maico") is, and has been since 1966, an unincorporated division of Textron, with its principal place of business in Minneapolis, Minnesota. Maico was the fourth largest hearing aid manufacturer in the United States, with sales in excess of three million ($3,000,000.00) dollars representing more than six per cent of the hearing aid market.

13. RADIOEAR CORPORATION (hereinafter "Radioear") is named a defendant herein. Radioear is a corporation incorporated under the laws of the State of Delaware, with its principal place of business at Coanosburg, Pennsylvania. Radioear has manufactured hearing aids since 1924. In 1970, Radioear was the seventh largest hearing aid manufacturer in the United States with the sales in excess of two million ($2,000,000.00) dollars, representing approximately four per cent (4%) of the hearing aid market.

CO-CONSPIRATORS

14. Various corporations, firms and individuals not made defendants in this complaint participated as co-conspirators in the violations alleged herein, and performed acts and made statements in furtherance thereof.

NATURE OF TRADE AND COMMERCE

15. Defendants are now and for some time have engaged in the business of manufacturing, distributing, selling and repairing hearing aids in various states of the United States and in foreign countries. Defendants distribute and sell hearing aid products to selected retail dealers located throughout the United States, who then resell to the general public. Wholesalers are rarely used in the distribution process.

16. In the course and conduct of their businesses, defendants ship or cause to be shipped, from their respective facilities located in their principal place of businesses aforementioned, in a continous and uninterrupted flow of interstate commerce, hearing aids to selected retail dealers throughout the United States.

17. Trade and commerce in the United States in hearing aids is substantial. In 1970, the total value of shipments amounted to fifty million ($50,000,000.00) dollars at the manufacturers' prices, and an estimated $175 million at retail prices.

In 1970, approximately fifty domestic manufacturers, domestic subsidiaries of foreign manufacturers and domestic distributors of foreign manufacturers sold approximately 510,000 hearing aids through 5,000 retail dealers who employed over 10,000 salesmen.

18. The success of the established hearing aid manufacturers, including defendants, in selling their products is based primarily on their ability to secure the services of retail dealers to sell their products to the hearing handicapped. Similarly, new entrants in the market to be successful must secure distribution through established dealers.

19. Approximately sixty per cent (60%) of the retail sales of hearing aids occur as a result of initial, direct contact between the hearing aid dealer and the hearing handicapped, while most of the remaining sales are made after the hearing handicapped are referred to dealers by medical doctors or hearing clinics. It is the practice among medical doctors and hearing clinics, after having determined that an individual may benefit from the use of a hearing aid, to recommend a hearing aid to the patient by the brand name and model, rather than by its general performance characteristics. This is done on the basis of actual tests with hearing aids which have been placed with such doctors or clinics by either the manufacturers if dealers. Inasmuch as the doctors and clinics do not sell hearing aids, the patient is referred to the hearing aid dealer in his locale who deals in the brand of hearing aid recommended. While the average price of a hearing aid to a dealer is approximately $100.00 the average retail price is approximately $350.00. Over fifty per cent (50%) of the persons with hearing impairment who purchase hearing aids are over sixty five years of age.

OFFENSES CHARGED

20. Beginning at a time unknown to plaintiff, and continuing up to and including the date of the filing of this

Complaint, the defendants and other persons acting for each of them, have been and are now engaged in:

A. A continuing combination and conspiracy to restrain interstate and foreign commerce of the United States in hearing aids in violation of Section 1 of the Sherman Act;

B. A continuing combination and conspiracy to monopolize and a combination and conspiracy to attempt to monopolize interstate and foreign commerce of the United States in hearing aids in violation of Section 2 of the Sherman Act.; and

C. Leases, sales and contracts relating to the interstate commerce of the United States in hearing aids in violation of Section 3 of the Clayton Act.

21. Each act of defendants and co-conspirators herein alleged was done in furtherance of the offenses charged in the preceding paragraph, was a part thereof and was done with the primary purpose and intent of restraining, monopolizing, attempting to monopolize and substantially lessening competition in the trade and commerce described herein. It was the intent, jointly and severally, of defendants and co-conspirators, *inter alia*, to:

A. Eliminate competition in hearing aids in the United States;

B. Use their monopoly power in hearing aids to eliminate competition;

C. Combine their economic power to eliminate competition in hearing aids; and

D. Obtain substantial and unconscionable profits for themselves, at the expense of plaintiffs, as a direct result

of the restrictions upon competition in the trade and commerce herein alleged.

ACTS OF DEFENDANTS AND CO-CONSPIRATORS

22. In the course and conduct of its business of manufacturing, distributing, selling and repairing hearing aids, defendants have been and are presently pursuing the following courses of action:

A. Requiring their respective selected dealers to sell their respective hearing aids within assigned geographic areas;

B. Requiring their respective selected dealers to deal exclusively in their respective hearing aids;

C. Fixing, establishing, controlling and maintaining the retail prices at which their dealers sell their respective hearing aids;

D. Prohibiting their dealers from dealing with certain potential customers;

E. Prohibiting non-dealers from dealing in, or repairing their respective hearing aids.

F. Appropriating and using for their purposes the names and addresses of their dealer's customers.

23. In furtherance of these courses of action, defendants have been and are now engaged, *inter alia,* in the following acts and practices:

A. Distributing and selling their hearing aids directly to selected retail dealers, and refusing to deal with all other dealers;

B. Refusing to issue the express product warranties to consumers unless and until their dealers have reported the names and addresses of their customers to them;

C. Encouraging or requiring their dealers to participate in cooperative advertising programs which preclude mention that the dealers offer competing brands of hearing aids for sale;

D. Engaging in extensive national brand advertising of their hearing aids;

E. Causing their dealers' retail prices for hearing aids to be set at more than 300% above the manufacturers' prices as to the dealers;

F. Selling repair parts and offering repair service only to their selected dealers, refusing to sell such parts to all others, including independent repairmen or repair centers, and refusing to offer repair service to all other dealers;

G. Entering into agreements or understandings with their respective dealers, which agreements, *inter alia,* either expressly or by implication:

1. Establish restrictive territories within which the dealers may advertise and sell their products;

2. Require exclusive dealing in defendants' products;

3. Assign sale or purchase quotas to be met by their dealers;

4. Encourage or require the use of the manufacturers' brand name in the dealers' trade styles;

5. Restrict the classes of customers with whom their dealers may deal;

6. Require their dealers to submit the names and addresses of their customers to the defendants;

7. Permit the defendants to terminate such agreements without cause upon thirty days notice; and

8. In the event of such termination, permit the defendants to repurchase the terminated dealers' products purchased from such defendants.

H. Expressing, communicating or emphasizing to their selected dealers their business policy of dissuading, discouraging, or prohibiting sales of competitive brands by such dealers by means of, *inter alia*, persuasion, pressure, harassment, coercion, or intimidation of such dealers to sell only defendants' products, and not to sell other brands.

24. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which they combined and conspired to do.

EFFECTS OF OFFENSES

25. The acts and practices of defendants enumerated in paragraphs 22 and 23, taken either individually or collectively, are oppressive, coercive, unfair and anti-competitive, and have the tendency and capacity of hindering, suppressing or eliminating competition. The intended and actual effects of the offenses heretofore alleged were and are that defendants and co-conspirators:

A. Hindered and suppressed competition between defendants and other hearing aid manufacturers;

B. Eliminated competition among and between dealers dealing in defendants' hearing aids;

C. Deprived such dealers of their freedom to select their customers and otherwise to function as free and independent dealers;

D. Deprived such dealers of their ownership of, and freedom to maintain, confidential lists of their customers;

E. Hindered and suppressed competition among dealers dealing in defendants' hearing aids;

F. Deprived retail dealers of hearing aids of their freedom to act in the best interests of the hearing handicapped and their own business interests and pursuits;

G. Deprived consumers of their right to fair and impartial recommendations from dealers in the selection of hearing aids for the alleviations of their hearing impairment;

H. Deprived consumers of the benefits of free competition.

I. Deprived those engaged in the repairing or servicing of hearing aids in competition with defendants of their right to repair or service defendants' hearing aids;

J. Raised, fixed, stablized and maintained at noncompetitive levels prices of hearing aids and equipment sold by defendant corporations and co-conspirators to plaintiff and members of the class;

K. Restricted and suppressed competition between and among defendants and co-conspirators, and deprived purchasers of aids and equipment, including plaintiff and members of the class, of the benefits of free and open competition.

L. Proximately damaged plaintiff and members of the class in their properties through having to pay a higher

price for hearing aids and services than what they would otherwise have had to pay in a free competitive market place.

M. Plaintiff and members of the class have been and are presently being damaged by the effects of the defendants' offenses.

FRAUDULENT CONCEALMENT

26. At all times relevant hereto Plaintiff had no knowledge of the combination and conspiracy herein alleged or of any action that might have led to the discovery thereof until the filing of actions by the Federal Trade Commission on May 8, 1973. Plaintiff and the other members of the class she represents could not have uncovered the conspiracy at an earlier date by the exercise of due diligence inasmuch as the unlawful conspiracy and activities were concealed by the defendants through their adoption of elaborate schemes including the resort to secrecy to avoid detection.

PRAYER

WHEREFORE, Plaintiff prays that this Court Order adjudge and decree:

A. That Plaintiff and the class she represents have judgment against the defendants for three fold the amount of damages determined that have been sustained as provided by Section 4 of the Clayton Act (15 U.S.C. Sec. 15);

B. That Plaintiff and the class she represents recover their costs of suit including reasonable attorneys' fees as provided by Section 4 of the Clayton Act (15 U.S.C. Sec. 15); and

C. That Plaintiff and the class she represents have such other and further relief, including injunctive, as the Court deems proper.

Dated: May 2nd, 1975.

COCHRANE & BRESNAHAN
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